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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 3rd June, 2021

Date of Decision: 07th July, 2021

\+ **C.R.P.1/2021 and CM APPL. 332/2021**

SATPRAKASH MEENA ..... Petitioner

Through: Mr. F.K. Jha, Advocate.

versus

ALKA MEENA ..... Respondent

Through: Mr. Abhinav Gupta & Mr. Nitesh Ranjan, Advocates.

CORAM:
JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The question in this petition is as to the applicability of The Hindu Marriage Act, 1955 (*hereinafter referred as the "HMA, 1955"*), in respect of the parties who belong to the *Meena* community in view of the exclusion under Section 2(2) of the HMA, 1955.

2. The Petitioner – Mr. Satprakash Meena and the Respondent- Ms. Alka Meena got married on 24th June, 2012. According to the Petitioner, the marriage was solemnized in Jaipur, Rajasthan, as per Hindu rites and customs. Both the parties belong to the *Meena* community and the same is an admitted position. The Petitioner is an engineer who is working in Delhi and the Respondent is stated to be a house maker. The parties have a minor child namely Master Lakshya, who was born on 12th April, 2013 in Delhi.

3. A petition seeking divorce under Section 13-1(ia) of the HMA, 1955was filed by the Petitioner on 2nd December, 2015, before the Principal

Judge (West), Family Court, Tis Hazari, Delhi. The Respondent did not appear in the said petition. There is a dispute as to whether the Respondent was served or not. The Respondent, however, preferred a transfer petition being ***Alka Meena v. Satprakash Meena [Transfer Petition Civil No. 1671/2016]*** before the Supreme Court. In the said transfer petition, according to the Petitioner, the Respondent took a categorical stand that the marriage was solemnized as per the Hindu rites and customs. Vide order dated 6th April, 2017, the transfer petition was disposed of, however, the Respondent was permitted to avail of the facility to participate in the proceedings through video conferencing.

4. An FIR was lodged by the Respondent under The Protection of Women from Domestic Violence Act, 2005 (*hereinafter the "DV Act"*) as also an application seeking maintenance, under Section 125 of The Code of Criminal Procedure, 1973(*hereinafter the "CrPC")* in the city of Jaipur.

5. In the divorce petition, since the Respondent did not appear, she was proceeded *ex-parte*. However, after she was permitted to participate in the proceedings through video conferencing by the Supreme Court (in the transfer petition), she filed an application under Order VII Rule 10 and Order VII Rule 11 of The Code of Civil Procedure, 1908 (*hereinafter "the CPC"*) before the Family Court. In the said application she prayed for rejection of the divorce petition, on the ground that the provisions of the HMA, 1955 do not apply to the parties concerned as they are members of a notified Scheduled Tribe in Rajasthan, and hence the HMA, 1955 would not be applicable to the case of the said parties in view of Section 2(2) of the HMA, 1955.

6. The said application was decided by the Family Court and the divorce petition was dismissed by holding that the provisions of the HMA, 1955 do

not extend to the *Meena* community, which is a notified Scheduled Tribe. The said order dated 28th November, 2020 is under challenge in the present petition.

Submissions of the Petitioner

7. Ld. counsel for the Petitioner Mr. Jha submits that the Respondent had admitted in various pleadings that the marriage was solemnized as per Hindu rites and customs. Reference was placed upon the transfer petition filed before the Supreme Court, the complaint filed under the DV Act in Rajasthan, application filed by the Respondent under Section 125 CrPC, as also the FIR registered by the Respondent under Section 498A Indian Penal Code (*hereinafter the "IPC")*. He submitted that since the Respondent admitted that the marriage was solemnized as per the Hindu rites and customs, the provisions of HMA, 1955 would be fully applicable to the facts of the case and hence the divorce petition under the provisions of the HMA, 1955 ought to be maintainable.

8. Reliance was placed on the judgment of the Supreme Court in ***Labishwar Manjhi v. Pran Manjhi and Ors. (2000) 8 SCC 587***, specifically upon paragraphs 5 and 6 of the said judgment, to argue that in the said judgment it has been clearly held that if the members of tribes follow customary and practices of Hinduism, the Hindu Succession Act, 1956(*hereinafter the "HSA, 1956")* would be applicable. The said case related to the *Santhal* Tribe, who were seen following Hindu customs, and hence the Supreme Court held that the HSA would be applicable to their situation, in spite of the said tribe being a notified tribe.

9. The submission of ld. Counsel for the Petitioner was that both the parties are following Hindu rites and customs, and although they are residing

in the city of Jaipur and they belong to the *Meena* community, the HMA, 1955 would be applicable.

10. He thereafter, relied upon the following judgments:-

i. ***OmPrakash v. LalitaMeena, 2015 (3) CDR 1217 (Raj)***

ii. ***Yamanaji H. Jadhav v. Nirmala, AIR 2002 SC 971***

iii. ***Subramani and Ors. v. M. Chandralekha, (2005) 9 SCC 407***

iv. ***Mirza Raja PushpavathiVijayaramGajapathi Raj Manne Sultan Bahadur and Ors. v. PushavathiVisweswarGajapathiraj and Ors., AIR 1954 SC 118***

v. ***Maneka Gandhi v. Indira Gandhi, AIR 1984 Delhi 428***

vi. ***Krishna Veni v. Union of India and Ors., 2021 SCC OnLine Cal 437***

11. Referring to the above judgments, ld. Counsel for the Petitioner argued that in order to establish the grounds of the objection which have been raised by the Respondent before the trial court and to decide the question as to whether a particular fact has been established or not, and for adjudication of the petition for divorce on that basis, evidence would have to be led. He submitted that if any particular customary law is alleged to be followed, as in the present case the wife has alleged that *Meena* tribe customs are being followed, the same cannot be presumed by the Court without evidence being adduced. Thus, he submitted that even if it is held that the Respondent is entitled to take the argument that the parties are governed by the customary practices of the *Meena* tribe, the trial court could not have presumed the same and dismissed the petition, without proper trial.

12. Mr. Jha, ld. counsel for the Petitioner further urged this Court that once a Scheduled Tribe follows the customs and practices of the particular religion,

they should be bound by the law that applies to the said religion. As seen in the present case, if it is held that the Scheduled Tribe of *Meena* would not be governed by the HMA,1955 it would lead to enormous difficulties for women as bigamy would be recognised and could even lead to desertion of women.

13. On the strength of these judgments and of these submissions, ld. Counsel for the Petitioner submitted that the impugned order dated 28th November, 2020 is not sustainable.

Submissions of the Respondent

14. Mr. Gupta, ld. Counsel appearing for the Respondent on the other hand, submitted that the Respondent had not filed a reply in the divorce petition as it was her stand that she was never served in the matter. Owing to the order passed in the transfer petition, it is only at the stage of final arguments that the Respondent entered appearance.

15. Ld. Counsel submitted that an application Under Order VII Rule 10 CPC and Order VII Rule 11 CPC was filed by the Respondent *inter alia* contending that due to the *Meena* tribe being a Scheduled Tribe in the State of Rajasthan, it's right to constitutional protection would be excluded if the provisions of the HMA, 1955 are held to be applicable. He submitted that the judgments of the various Courts, including the Supreme Court, are clear to the effect that even if Hindu customs are being followed, the same would not automatically mean that the provisions of the HMA, 1955 would be applicable in the case of members of a notified Scheduled Tribe.

16. Reliance was placed upon the following judgments by the ld. Counsel for the Respondent:

i. ***Dr. Surajmani Stella Kujur v. Durga Charan Hansdah and Anr., (2001) 3 SCC 13***:

ii. ***Dr. Bini B. v. Jayan P.R., 2015 SCC OnLine Ker 39489***.:

iii. ***Rajendra Kumar Singh Munda v. Smt. Mamta Devi, 2015 SCC OnLine Jhar 3735***

iv. ***Ramlal v. Prem Bai [S.B. CIVIL MISC. APPEAL NO. 1271/1999 judgment dated 10th July, 2018 of The Rajasthan High Court],***

v. ***Rupa Debbarma v. Tapash Debbarma, 2020 SCC OnLine Tri 425***

17. On the strength of these judgments, it was submitted by the ld. Counsel for the Respondent that the impugned judgment dismissing the divorce petition, does not deserve to be interfered with.

Submissions made in Rejoinder

18. Mr. Jha, ld. Counsel appearing for the Petitioner took the Court through various documents i.e., the marriage card of the parties, the complaint under Section 498A of the IPC, the FIRs registered pursuant to the said complaint, the complaint made under the DV Act, the Petition under Section 125CrPC and the affidavit in support thereof, the charge sheet under Section 498A of the IPC. On the strength of these documents and legal judicial records, Mr. Jha, ld. Counsel submitted that these documents would show that the marriage of the parties took place as per Hindu *reeti riwaz* through the *Saptpadi* and in front of the fire. Thus, the parties completely adhered to the Hindu way of conducting a marriage, customs and rites. Therefore, the HMA, 1955 would applicable to them. The marriage card is also emphasised to show that it begins with the phrase '*Shree Ganeshay Namah'.*

19. He thereafter relied upon the transfer petition filed before the Supreme Court which was disposed of on 6th April, 2017. Therein, the Respondent had

made an assertion that the marriage was conducted as per the Hindu rites and customs.

20. Thereafter, Mr. Jha, ld. Counsel referred to the following judgments:

i) ***Ms. Jorden Diengdeh v. S.S. Chopra, AIR 1985 SC 935.***

ii) ***Nihoto Sema v. Kanili Kimi Limi, (1986) 2 GLR 296***

iii) ***Sekawat s/o Shaukat Tadvi v. Rehane Budhan Tadavi &Anr., 2016 SCC OnLine Bom 3853***

21. On the strength of these three judgments Mr. Jha submitted that for Scheduled Tribes who profess Christianity or Islam are concerned, the respective personal law would apply. Similarly, in the present case, since the parties are following Hinduism customary and rites, the HMA, 1955ought to be made applicable.

22. Mr. Gupta, ld. Counsel for the Respondent, however, on the other hand submitted that Hinduism is not considered to be a religion but only a way of life. Though, the parties follow the customary principles and rites of Hinduism, the status of a tribe of the *Meena* community cannot be taken away. On a query from the Court as to what are the methods of obtaining divorce in the *Meena* community, he submitted that the same is through a *Panchayat* and there is a Board for the said purpose. He further submitted that since there is a child in the present case, the Scheduled Tribe status of the child cannot also be taken away. Though Scheduled Tribes who are Christian and Muslim, may be covered by their respective personal law, due to the specific exclusion under the HMA, 1955 the Scheduled Tribe of *Meena* community would not be covered by the said Act. He further submitted that the members of the *Meena* community pray to Hanuman Ji which is a deity, also referred to as Balaji.

Analysis and findings

23. The parties in this petition, both belong to the *Meena* Community. It is the case of the wife that the *Meena* community is covered by the exclusion under Section 2(2) of the HMA which reads:

> *"(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs."*

24. The divorce petition under Section 13-1(ia) of the HMA was dismissed by the trial court on the basis of the exclusion in Section 2(2) of the HMA, 1955. The trial court had not conducted the trial in the petition or considered the evidence in the matter, but summarily dismissed the petition simply on the ground that since the parties belong to the *Meena* Community, the provisions of the HMA, 1955 would not be applicable. The relevant extracts of the trial court judgment read as under:-

> *"7. Hence, by Sub-Section 2 of Section 2 of HMA, Hindu Marriage Act is not applicable to the members of Scheduled tribe within the meaning of Clause 25 of Article 366 of the Constitution, unless the Central Government by notification in the official Gazette otherwise directs. No such notification is put forth or pleaded before the court by any of the sides.*
>
> *8. Hence, by virtue of Section 2 of sub-section (2) of HMA, the present petition filed by the petitioner seeking decree of dissolution of marriage under HMA is not maintainable being barred by Section 2(2) of HMA itself.*
> *XXX*

> *12. Accordingly, in view of the above discussion and in the light of the above mentioned pronunciations of law, the present petition filed by the petitioner / non-applicant-husband u/s.13(1)(ia) of HMA 1955 as amended by the marriage laws (Amendment Act, 1976) is dismissed being not maintainable in view of the provisions of Section 2(2) of Hindu Marriage Act. The petition is dismissed. File be consigned to Record Room".*

25. The submissions made on behalf of the parties reveal that there are two judgments of the Supreme Court that are relied upon. The husband i.e. the Petitioner who has preferred the divorce petition relies upon ***Labishwar Manjhi (supra)*** whereas the Respondent- wife relies upon the judgment of the Supreme Court in ***Dr. Surajmani Stella Kujur (supra).***

26. In ***Labishwar Manjhi (supra),*** the Supreme Court was dealing with a petition relating to inheritance amongst the members of the *Santhal* Tribe. According to the customs of the *Santhal* Tribe, females were excluded from the right of succession. The Trial Court held that the parties would be bound by Hindu law and that the widow would be entitled to inherit the property of the deceased as they followed Hindu rites and customs. The ld. Single Judge of the High Court allowed the appeal but the ld. Division Bench remanded the matter to the First Appellate Court to examine the question as to whether parties were sufficiently Hinduised or not. The First Appellate Court on remand held that the parties were sufficiently Hinduised and Hindu law of succession would apply. The ld. Division Bench in appeal, however, held that the Hindu law of Succession prior to the amendment would apply and hence the widow inherited the property during her life time and on her death would devolve to the agnates of her husband. The question before the Supreme Court

was as under:-

> *"The question which arises in the present case is, whether the parties who admittedly belong to the Santhal Tribe are still continuing with their customary tradition or have they after being Hinduised changed their customs to that which is followed by the Hindus."*

27. The Supreme Court, thereafter, analysed the evidence on record and held that though the parties belonged to the *Santhal* tribe, they followed the customs of Hindus and not of the *Santhal* tribe. Thus, the exclusion under Section 2(2) of the HSA, 1956 would not apply to the parties. The Supreme Court then concluded as under:-

> *"**6.** The question which arises in the present case is, whether the parties who admittedly belong to the Santhal Tribe are still continuing with their customary tradition or have they after being Hinduised changed their customs to that what is followed by the Hindus. It is in this context when the matter came first before the High Court, the High Court remanded the case for decision in this regard. After remand, the first appellate court recorded the finding that most of the names of their families of the parties are Hindu names. Even P.W. 1 admits in the cross-examination that they perform the pindas at the time of death of anybody. Females do not use vermilion on the forehead after the death of their husbands, widows do not wear ornaments. Even P.W. 2 admits that they perform Shradh ceremonies for 10 days after the death and after marriage females used vermilion on their foreheads. The finding is that they are following the customs of the Hindus and not the Santhal's. In view of such a clear finding it is not possible to hold that sub-section (2) of Section 2 of the Hindu Succession Act*

> *excludes the present parties from the application of the said Act. Sub-section (2) only excludes members of any Scheduled Tribe admittedly as per finding recorded in the present case though the parties originally belong to the Santhal Scheduled Tribe they are Hinduised and they are following the Hindu traditions. Hence, we have no hesitation to hold that sub-section (2) will not apply to exclude the parties from application of the Hindu Succession Act. The High Court fell into error in recording a finding to the contrary. In view of this, the widow of Lakhiram would become the absolute owner by virtue of Section 14 of the said Act, consequently the gift given by her to Appellants 2 and 3 was a valid gift, hence the suit of Respondent No. 1 for setting aside the gift deed and inheritance stands dismissed."*

28. Thus, in the above decision the following factors were considered by the Supreme Court viz.,

- The names of the parties and their families are Hindu names;
- At the time of death of a family member Pindas are performed;
- Women do not wear vermilion after the death of the husband;
- Widows do not wear ornaments.
- Shradh Ceremonies are performed for 10 days after death.

29. On the basis of these practices, the Supreme Court held that the parties were Hinduised as they were following Hindu traditions. Thus, the exclusion under Section 2(2) of the HSA, 1956 was held to not apply to the parties and they would be governed by the provisions of the HSA. It is relevant to note that the exclusion in Section 2(2) of HMA and Section 2(2) of HSA, 1956 are identical in wording.

30. In ***Dr. Surajmani Stella Kujur*** (***supra***), the issue was one of bigamy.

The Appellant in the said case had conceded that both the parties were tribals who otherwise were professing Hinduism. The husband had solemnised the second marriage during the subsistence of the first marriage. The wife had then argued that the husband is liable to be prosecuted for the offence under Section 494 IPC. The wife had claimed before the Trial Court in the said case that she was of Hindu religion but since there was no notification under Section 2(2), the husband could be prosecuted for bigamy. According to the wife, the tribe mandated monogamy as a rule. The Supreme Court, however, observed as under:-

> *"8. No custom can create an offence as it essentially deals with the civil rights of the parties and no person can be convicted of any offence except for violation of law in force at the time of commission of the act charged. Custom may be proved for the determination of the civil rights of the parties including their status, the establishment of which may be used for the purposes of proving the ingredients of an offence which, under Section 3(37) of the General Clauses Act, would mean an act or omission punishable by any law by way of fine or imprisonment. Article 20 of the Constitution, guaranteeing protection in respect of conviction of offence, provides that no person shall be convicted of any offence except for violation of law in force at the time of commission of the act charged as an offence. Law under Article 13 clause (3) of the Constitution means the law made by the legislature including intra vires statutory orders and orders made in exercise of powers conferred by the statutory rules."*

31. The Supreme Court further held that the alleged custom of monogamy of the *Santhal* Tribe does not have the force of law and cannot prohibit the

solemnisation of a second marriage. Mere pleading of the custom is not sufficient. Until and unless a second marriage is held to be void, Section 494 IPC would not apply.

32. The judgment in ***Dr. Surajmani Stella Kujur*** (***supra***), was considered by the Kerala High Court in ***Dr. Bini B.(supra).*** In the said case, the parties belonged to the *Kuruma* community/tribe, they otherwise professed Hinduism. The husband had filed a petition under Section 9 of the HMA, 1955 for restitution of conjugal rights. The trial court had allowed the petition under Section 9. In appeal, it was contended that the provisions of HMA, 1955 would not apply in view of Section 2(2). The ld. Division Bench of the Kerala High Court considered various judgments including ***Dr. Surajmani Stella Kujur*** (***supra***) and held as under:-

> *"15. It is clear from the above decisions that when custom become part of the tribal community as a law, it will guide their attitude and practice in their social and economic life. Custom is considered as the guiding principle among them, which will acquire the status of law. The party claiming custom is necessary to plead and prove that such custom followed in the community is ancient and certain. Since custom is aftcient (sic ancient) the person relying bn(sic on) it has to establish it by clear and unambiguous evidence! It is true mat (sic that) the majority of the Tribal people are living below the poverty line and they have not reached development which is equal to the civilized section of the other people in the civil society. Therefore, the validity of the custom must be examined and decided by a Court, when full facts are placed before it for consideration.*
>
> *16. The application of custom among the Tribes and restrictions under section 2(2) of the Act, were not*

> *considered by the Family Court. It has been clearly stipulated in the Act that the provisions of the Act are not applicable to members of the Scheduled Tribe unless there is a notification issued by the Central Government in the Official Gazette making the Act applicable to the scheduled tribes. No such notification has been produced before the Family Court, therefore the order passed by the Family Court, Kalpetta is liable to be set aside. Hence, this appeal is allowed. We set aside the order dated 27.9.2012 in O.P. No. 148/2011 of Family Court, Kalpetta and the matter is remitted to the lower Court for fresh consideration as per law. Both parties are at liberty to adduce fresh evidence in support of their contentions".*

33. Thus, the Kerala High Court set aside the decree under Section 9 but remanded the matter for fresh consideration and for leading the evidence to prove the customs as was relied upon by the parties.

34. In ***Rajendra Kumar Singh Munda (supra)*** the parties belonged to the *Munda* tribe which was a notified tribe in Jharkhand and the ld. Division Bench took the view that *Munda* being a tribal community that was notified for the state of Jharkhand, in view of the provisions of Section 2(2) of the HMA, 1955 and the constitutional protection granted, the decree of divorce under the HMA, 1955 was not sustainable and the same was set aside.

35. In ***Ram Lal V. Prem Bai (supra),*** the district court, had issued a decree in the wife's favour but the petitioner challenged it in the high court pleading that being a tribal man, the decree passed by the lower court under the HMA, 1955 is not binding on him. The Court quashed the order passed by a lower court in Tonk, Rajasthan, granting conjugal rights to a tribal woman under the HMA, 1955, holding that the members of the *Meena* community are not

covered under HMA, 1955.

36. In ***Anom Apang v. Geeta Singh (2012) 2 GLR 583,*** the Gauhati High Court held that even though one of the parties belong to the *Adi* Tribe, since the marriage was solemnised according to the Hindu customs and traditions, the HMA, 1955 would apply. In ***Rupa Debbarma v. Tapash Debbarma (supra),*** the Tripura High Court disagreed with the Gauhati High Court. The parties belonged to the *Tripuri* community. The trial court granted a decree of divorce under the HMA on the ground of cruelty and desertion. The question before the High Court was whether the said divorce granted under the HMA was sustainable or not. The Tripura High Court noted both ***Labishwar Manjhi (supra)*** and ***Dr. Surajmani Stella Kujur (supra)*** and held that the provisions of the HMA, 1955 would not apply. The observations of the Tripura High Court are as under:-

> *"**35.** So far the question of conversion is concerned, simply because the marriage has been performed following the Hindu customs and rites, it cannot be stated that parties intending marriage had been converted to Hinduism. Conversion is a conscious abandonment of the customs of the community or the religion and adoption of the religion which someone intends to be converted to. None of the appellant and the respondent did not claim to have converted to Hinduism by abandoning their customs. Thus, there had been no conversion and by considering "conversion", the Hindu Marriage Act cannot be applied. This court however, will affirm the finding in respect of cruelty as returned by the Addl. District Judge. However, the desertion has not been proved on preponderance of probabilities in as much as, the appellant has clearly stated that she had intention to restitute the marriage. But this finding will have no effect in the suit as the suit itself*

is not maintainable having barred by Section 2(2) of the Hindu Marriage Act, 1955."

37. A perusal of the various decisions discussed above shows that there is divergence in the views being taken by various High Court. The two decisions which are to be considered by this Court are the decisions of the Supreme Court in ***Labishwar Manjhi (supra)*** and ***Dr. Surajmani Stella Kujur (supra)***.

38. Before proceeding to adjudicate the question of law that arises, some facts need to be noted. In the present case, both parties have since inception pleaded that they belong to the *Meena* Community, however their marriage was solemnised according to Hindu rites and ceremonies and they follow Hindu customs. This fact is admitted by the wife in several documents and pleadings. Relevant extracts from the various documents are set out herein below:-

(1) **Marriage Invitation:-** A copy of the marriage invitation clearly shows that the wedding was conducted in accordance with the Hindu rites and customs as the auspicious programmes included Lagan, Barat etc., The invitation also uses all the symbols including the term "*Shree Ganeshaya Namha"*(***श्रीगणेशायेनमः***)

(2) **Complaint and FIR and charge sheets registered under Section 498 (a) IPC**:- Pursuant to the said complaint filed by the wife under Section 498 of the IPC it is admitted by the wife that she was married to the Petitioner as per "*Poore Hindu Riti Riwaz"(पूरेहिन्दूरीतीरिवाज़)*

(3) **Complaint under the Domestic Violence Act:-**In this complaint, she admits that she was married to the Petitioner on 24th June, 2012 as per `*Hindu Riti Riwaz, Saptapadi ke Anusar'.(हिन्दूरीतीरिवाज़,सप्तपदीकेअनुसार)*

(4) **Application under Section 125 CrPC**:- In this complaint she admits that she was married as per "*Hindu Riti Riwaz ,Saptapadi ke Anusar"(हिन्दू रीती रिवाज़, सप्तपदी के अनुसार)*

(5) **Affidavit:-**In the affidavit filed by the wife she admits that the marriage was conducted with the Petitioner as per "*Hindu Riti Riwaz Se Agni ke Samaksh Saptapadi ke Anusar" (हिन्दू रीतीरिवाज़ से अग्नि के समक्ष सप्तपदी के अनुसार)*

(6) **Transfer Petition filed before the Supreme Court**

In the transfer petition, it is stated :

> **"2. *Brief Facts of the case are as under:-***
> *1. On 24.06.2012, the marriage between the Petitioner and the Respondent was solemnized according to Hindu Rites and Customs at Jaipur, Rajasthan according to Hindu rights and ceremonies."*

39. The above documents and exhibits before the Trial Court clearly show that the Respondent-wife admits:-

(i) that the marriage was conducted as per the "*Hindu Riti Riwaz"*

(ii) that the marriage was effected by following the "*Saptapadi"*

(iii) that the marriage was conducted in front of *`Agni'* - fire.

40. The above admissions have been made by the Respondent wife repeatedly in various documents which were exhibited before the trial court.

41. The question that arises is as to whether in these facts, the parties ought to be governed by the provisions of the HMA or should they be relegated to procedures of the Meena tribe?

42. In so far as the provision Section 2(2), HMA,1955 is concerned, it is

clear that the provisions of the Act would not apply to the members of the Scheduled Tribal community unless the Scheduled Tribe is a notified tribe. It is the admitted position between parties that the said community is not a notified tribe. Section 2(2) reads as under:-

> *"(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs."*

43. The Act, however, applies to any person who is Hindu by religion and includes a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana even followers of *Brahma Prathana of Arya Samaj*. It also applies to Buddhists, Jains and Sikhs by religion. The HMA, 1955 regulates all aspects of marriages applicable to Hindus including restitution of conjugal rights of judicial separation, divorce etc. If the HMA, 1955 does not apply to any particular individual or any parties, such parties would be relegated to their respective customary practices or community Courts. In fact, in ***Nihoto Sema (supra)***, the High Court of Gauhati considered this issue in relation to parties belonging to the *Naga* tribes but were professing Christian religion. The Court framed the following question:

> *"3.The question is whether the Indian Divorce Act, 1869 is applicable to the State of Nugaland (sic Nagaland)."*

44. In para 26, the Court observed that there is nothing to show even in the texts that there is any customary form of divorce prevalent amongst the *Sema Nagas*. Thereafter the Court held in para 28 as under:-

> *"...In this Case, the Additional Deputy Commissioner in his order clearly held that when the parties are unwilling to go to the customary courts, the Court cannot compel the parties to go to the panchayat. This is obviously a case where the wife has been complaining that her husband has been guilty of adultery coupled with cruelty and sought divorce and that the husband-petitioner took the child (daughter, aged about 3 ½ years) away from the Nursery School without the knowledge and consent of the respondent (wife) and separated the child from the mother and prayed for the custody of the child. This appears to be a case where the marriage is irretrievably broken and persuasion is no proper remedy."*

45. Similarly, in ***Sekawat (supra)*** the Bombay High Court held that the wife belonging to the Muslim community would be entitled to claim maintenance under Section 125 of the CrPC.

46. In the present case, admittedly, the party's marriage was solemnised as per the Hindu customs and rites. Ld. counsel for the Respondent-wife admitted during the course of submissions that the wife did not deny that she is a Hindu and the tribe is a Hindu tribe, however, according to him this would not take away the status of the parties being a part of the notified Scheduled Tribe under the Constitution of India.

47. The word `Hindu' is not defined in any of the statutes. It is in view of the fact that there is no definition of Hindu, that the Supreme Court has held in ***Labishwar Manjhi (supra)*** that if members of Tribes are Hinduised, the provisions of the HMA, 1955 would be applicable. The manner in which the marriage has been conducted in the present case and the customs being followed by the parties show that as in the case of Hindus, the marriage is

conducted in front of the fire. The Hindu customary marriage involves the ceremony of *Saptapadi* which has also been performed in the present case. The various other ceremonies, as is clear from the marriage invitation are also as per Hindu customs. If members of a tribe voluntarily choose to follow Hindu customs, traditions and rites they cannot be kept out of the purview of the provisions of the HMA, 1955. Codified statutes and laws provide for various protections to parties against any unregulated practices from being adopted. In this day and age, relegating parties to customary Courts when they themselves admit that they are following Hindu customs and traditions would be antithetical to the purpose behind enacting a statute like the HMA, 1955. The provisions of exclusion for example under Section 2(2) are meant to protect customary practices of recognised Tribes. However, if parties follow Hindu customs and rites, for the purpose of marriage, this Court is inclined to follow the judgment of the Supreme Court in ***Labishwar Manjhi (supra)*** to hold that the parties are Hinduised and hence the HMA, 1955 would be applicable. Moreover, nothing has been placed before the Court to show that the *Meena* community Tribe has a specialised Court with proper procedures to deal with these issues. In these facts, if the Court has to choose between relegating parties to customary Courts which may or may not provide for proper procedures and safeguards as against codified statutes envisioning adequate safeguards and procedures, this Court is inclined to lean in favour of an interpretation in favour of the latter, especially in view of the binding precedent of the Supreme Court in ***Labishwar Manjhi (supra)*** which considered an identical exclusion under the HSA,1956.

48. In so far as the judgment in ***Dr. Surajmani Stella Kujur (supra)*** is concerned, the said decision dealt with an offence of bigamy which was

pleaded to be contrary to the customs in the *Santhal* Tribe. The said custom had not been established on record and hence the Court held that since the custom was not established by the parties, an offence could not be created by a mere pleading of a custom. Moreover, even in ***Dr. Surajmani Stella Kujur (supra)***, the Supreme Court clearly holds that *for determination of civil rights, customs may be proved and can form the basis*. Thus, insofar as divorce proceedings are concerned, if proper tribal customs are not established or the following of Hindu customs or rites is admitted by the parties, there is no reason to hold that the provisions of the HMA, 1955 would not apply.

49. Unfortunately, the trial court has failed to consider the admissions made by the Respondent wife which have been set out hereinabove leading to the incorrect conclusion. The trial court also failed to consider the decision of the Supreme Court in ***Labishwar Manjhi (supra).***

50. Courts have been repeatedly confronted with the conflicts that arise in personal laws. Persons belonging to various communities, castes and religions, who forge marital bonds, struggle with such conflicts. It is with the hope of bringing uniformity and to eliminate these struggles and conflicts, that the Supreme Court way back in 1985, in ***Mohd. Ahmed Khan v. Shah Bano Begum and Ors, (1985) 2 SCC 556*** observed:

> *"32. It is also a matter of regret that Article 44 of our Constitution has remained a dead letter. It provides that "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India". There is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law. A common Civil Code will help the cause of national*

> *integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to do so. A counsel in the case whispered, somewhat audibly, that legislative competence is one thing, the political courage to use that competence is quite another. We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform. But, a beginning has to be made if the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts because, it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge the gap between personal laws cannot take the place of a common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case."*

51. Again in ***Ms Jordon Diengdeh v. S.S. Chopra, (1985) 3 SCC 62***, the Supreme Court observed in the context of dissolution of marriage between a couple wherein the wife belong to the Naga Tribe and the husband was a Sikh by religion that Article 44 of the Constitution needs to be implemented in its letter and spirit. The Supreme Court notices the various provisions under the personal laws applicable to marriages under the Hindu Marriage Act, Special Marriage Act, Parsi Marriage and Divorce Act, Muslim Law etc. The Court then concluded and observed as under:-

> *"**7.** It is thus seen that the law relating to judicial separation, divorce and nullity of marriage is far,*

> *far from uniform. Surely the time has now come for a **complete reform** of the law of marriage and make a uniform law applicable to all people irrespective of religion or caste. It appears to be necessary to introduce irretrievable breakdown of marriage and mutual consent as grounds of divorce in all cases. The case before us is an illustration of a case where the parties are bound together by a marital tie which is better untied. There is no point or purpose to be served by the continuance of a marriage which has so completely and signally broken down. We suggest that the time has come for the intervention of the legislature in these matters to provide for a uniform code of marriage and divorce and to provide by law for a way out of the unhappy situations in which couples like the present have found themselves in. We direct that a copy of this order may be forwarded to the Ministry of Law and Justice for such action as they may deem fit to take. In the meanwhile, let notice go to the respondents."*

52. The decisions in ***Shah Bano (supra)*** and ***Ms Jordon Diengdeh (supra)*** were rendered way back in 1985 and more than 35 years have been passed. The Supreme Court had expressed hope and observed that the time has come for enacting a uniform code of marriage and divorce and urged for a 'complete reform'. These very sentiments have been again reiterated in ***Sarla Mudgal Vs. UOI AIR 1995 SC 1531*** and ***Lily Thomas (2000) 6 SCC 224.***

53. In ***John Vallamattom and Another v. Union of India, (2003) 6 SCC 611***, the Supreme Court considered ***Sarla Mudgal (supra)*** and further observed:

> *"44. Before I part with the case, I would like to state that Article 44 provides that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. The*

aforesaid provision is based on the premise that there is no necessary connection between religious and personal law in a civilized society. Article 25 of the Constitution confers freedom of conscience and free profession, practice and propagation of religion. The aforesaid two provisions viz. Articles 25 and 44 show that the former guarantees religious freedom whereas the latter divests religion from social relations and personal law. It is no matter of doubt that marriage, succession and the like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution. Any legislation which brings succession and the like matters of secular character within the ambit of Articles 25 and 26 is a suspect legislation, although it is doubtful whether the American doctrine of suspect legislation is followed in this country. In Sarla Mudgal v. Union of India [(1995) 3 SCC 635: 1995 SCC (Cri) 569] it was held that marriage, succession and like matters of secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution. It is a matter of regret that Article 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies."

54. The need for a Uniform Code has been again echoed by the Supreme Court in ***ABC v. State (NCT of Delhi) (2015) 10 SCC 1,*** wherein it was held:

"20. *It is imperative that the rights of the mother must also be given due consideration. As Ms Malhotra, learned Senior Counsel for the appellant, has eloquently argued, the appellant's fundamental right of privacy would be violated if she is forced to disclose the name and particulars of the father of her child. Any responsible man would keep track of*

> *his offspring and be concerned for the welfare of the child he has brought into the world; this does not appear to be so in the present case, on a perusal of the pleading as they presently portray. Furthermore, Christian unwed mothers in India are disadvantaged when compared to their Hindu counterparts, who are the natural guardians of their illegitimate children by virtue of their maternity alone, without the requirement of any notice to the putative fathers. It would be apposite for us to underscore that our directive principles envision the existence of a Uniform Civil Code, but this remains an unaddressed constitutional expectation."*

55. Recently, in ***Jose Paulo Coutinho v. Maria Luiza Valentina Pereira and Another, (2019) 20 SCC 85***, the Supreme Court observed:

> "*..24. It is interesting to note that whereas the Founders of the Constitution in Article 44 in Part IV dealing with the Directive Principles of State Policy had hoped and expected that the State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territories of India, till date no action has been taken in this regard. Though Hindu laws were codified in the year 1956, there has been no attempt to frame a Uniform Civil Code applicable to all citizens of the country despite exhortations of this Court in Mohd. Ahmed Khan v. Shah Bano Begum [Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556 : 1985 SCC (Cri) 245] and Sarla Mudgal v. Union of India [Sarla Mudgal v. Union of India, (1995) 3 SCC 635 : 1995 SCC (Cri) 569] ."*

56. The backdrop of all the above decisions and the crux of Art. 44 of the Constitution is well captured in the Constituent Assembly Debates. Dr. B.R. Ambedkar while debating on Article 35 (now Article 44 of the Constitution

of India) ***[Constituent Assembly Debates, Volume 7, 23rd November 1948]*** said:

> *"My friend, Mr. Hussain Imam, in rising to support the amendments, asked whether it was possible and desirable to have a uniform Code of laws for a country so vast as this is. Now I must confess that I was very much surprised at that statement, for the simple reason that we have in this country a uniform code of laws covering almost every aspect of human relationship. We have a uniform and complete Criminal Code operating throughout the country, which is contained in the Penal Code and the Criminal Procedure Code. We have the Law of Transfer of Property, which deals with property relations and which is operative throughout the country. Then there are the Negotiable Instruments Acts: and I can cite innumerable enactments which would prove that this country has practically a Civil Code, uniform in its content and applicable to the whole of the country.* ***The only province the Civil Law has not been able to invade so far is Marriage and Succession. It is this little corner which we have not been able to invade so far and it is the intention of those who desire to have article 35 as part of the Constitution to bring about that change****. Therefore, the argument whether we should attempt such a thing seems to me somewhat misplaced for the simple reason that we have, as a matter of fact, covered the whole lot of the field which is covered by a uniform Civil Code in this country. It is therefore too late now to ask the question whether we could do it. As I say, we have already done it."*

57. The need for a Uniform Civil Code as envisioned under Article 44, has been reiterated from time to time by the Supreme Court. Cases like the present

one repeatedly highlight the need for such a Code - 'common to all', which would enable uniform principles being applied in respect of aspects such as marriage, divorce, succession etc., so that settled principles, safeguards and procedures can be laid down and citizens are not made to struggle due to the conflicts and contradictions in various personal laws. In modern Indian society which is gradually becoming homogenous, the traditional barriers of religion, community and caste are slowly dissipating. The youth of India belonging to various communities, tribes, castes or religions who solemnise their marriages ought not to be forced to struggle with issues arising due to conflicts in various personal laws, especially in relation to marriage and divorce. The hope expressed in Article 44 of the Constitution that the State shall secure for its citizens Uniform Civil Code ought not to remain a mere hope. The Supreme Court had, in 1985 directed that the judgment in ***Ms. Jordon Diengdeh (supra)*** to be placed before the Ministry of Law to take appropriate steps. However, more than three decades have passed since then and it is unclear as to what steps have been taken in this regard till date. Accordingly, let the copy of the present judgment be communicated to the Secretary, Ministry of Law & Justice, Government of India, for necessary action as deemed appropriate.

58. The appeal is allowed. The impugned judgment is not sustainable and is accordingly set aside. Trial court is directed to proceed with the adjudication of the petition under 13-1(ia) of the HMA, 1955 on merits and render a decision within six months.

PRATHIBA M. SINGH
JUDGE

JULY 07, 2021
MR/RC